IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0311

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CARL MELVIN ANKENY,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Third Judicial District Court,
Anaconda-Deer Lodge County, the Honorable Ray J. Dayton, Presiding

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Carl Melvin Ankeny (Ankeny), the Appellant, replies to the Appellee's Brief as follows:

I. THE SUFFICIENCY OF THE EVIDENCE ON THE ELEMENT OF "PARTNER" FOR A CONVICTION UNDER MONTANA'S PARTNER FAMILY MEMBER ASSAULT STATUTE IS A LEGAL QUESTION FOR DETERMINATION BY THIS COURT.

The question of whether the State presented sufficient evidence that Ankeny and Carter were "partners" as that term is defined for purposes of Montana's Partner Family Member Assault statute is more complicated than the State suggests. The question involves not just an examination of the sufficiency of the evidence as to this element in this case; but also involves a policy determination as to whether the Legislature intended to provide such a fluid definition to the statute that a conviction under its terms is left to speculation and conjecture. Is Montana's Partner Family Member Assault statute really so broadly defined so as to include persons who had just gone out on their first date? And if so, what are the implications for courts throughout Montana who are required to issue restraining orders based on the meaning given the statute's terms by this Court?

The State cites to the case of *State v. Merseal*, 167 Mont. 412, 415, 538 P.2d 1366, 1367 (1975) for the "fundamental rule" that questions of fact are to be determined solely by the jury. (See Appellee's Br. at 10.) *Merseal* does cite to this rule; but more importantly, *Merseal* goes on to clarify that "this rule has no application where the standard of legal sufficiency has not been met." *Merseal*,

167 Mont. at 415, 538 P.2d at 1368. In fact, *Merseal* makes it clear that where the standard of legal sufficiency has not been met, it becomes this Court's duty to set aside the judgment.

When addressing the sufficiency of the evidence that was actually presented at trial as to whether Carter and Ankeny were truly "partners" as that term is defined under the statute, the State glosses over Carter and Ankeny's in-court sworn testimony that they were on their first date, and instead, draws this Court's attention to prior inconsistent statements made by Carter in a letter where she referred to Ankeny as her boyfriend. Again, the State reads the word "boyfriend" into the statute--a form of relationship not placed there by the Legislature. Finally, it should go without saying that Carter's jilted ex-boyfriend's "belief" there was something more going on between Carter and Ankeny does not qualify as legally sufficient evidence to support a conviction.

II. IT WAS ERROR TO ADMIT THE EXPERT TESTIMONY OF THE DOMESTIC VIOLENCE ADVOCATE THAT IT WAS COMMON FOR DOMESTIC VIOLENCE VICTIMS TO RECANT.

The error in the admission of the expert testimony is demonstrated by the prosecutor during her closing argument. The prosecutor told the jury:

> Thompson told you, the purpose of his testimony was to help you understand why victims of domestic violence; it's common that victims recant. And that what we had in this statement. . . . We have a recant.
>
> . . .

> She recanted and it's common for victims of domestic violence; which she is by her own admission, common to recant.

(Tr. at 255.)

Under the facts of this case, Thompson's testimony improperly bolstered the credibility of the alleged victim's prior inconsistent statements and its admission was reversible error.

III. TRIAL COUNSEL WAS INEFFECTIVE.

In Ankeny's first brief on appeal, he asserted that trial counsel was ineffective for failing to object to the introduction of hearsay statements made by Carter to Nisbet. This claim was based on the trial counsel's assertions that he was going to call Carter to testify if the State did not. In reply, the State has argued that Carter's statements were admissible as prior inconsistent statements under Mont. R. Evid. 801(d)(1)(A). To the extent that the statements were admitted following Carter's testimony, and to the extent that her prior statements were inconsistent with her trial testimony, Ankeny agrees. Admission of the statements as prior inconsistent statements, however, begs the question as to whether prior inconsistent statements alone, not given under oath, would be sufficient to sustain a conviction for partner family member assault. See *State v. White Water*, 194 Mont. 85, 634 P.2d 636 (1981).

The State indicates that there appears to be a record-based explanation why counsel did not object to the admission of the 911 tapes; "though it is less clear."

The State agrees with the characterization of the 911 tapes as "double hearsay" but argues that both components were admissible--statements of Carter as inconsistent statements and statements of Nisbet as prior consistent statements. (Appellee's Br. at 22.) Ankeny cannot agree that the statements made by Nisbet to the 911 operator qualify as prior consistent statements. Certainly, Nisbet's alleged motive to fabricate arose before he made the statements which precluded their admissibility under this rule. See *State v. McOmber*, 2007 MT 340, 340 Mont. 262, 173 P.3d 690 (statements not admissible as prior consistent statements as witness's alleged motive to fabricate arose before he made statements).

Again, the prejudicial impact of this testimony is demonstrated by the use given this evidence by the prosecutor during her closing argument:

> Well how do we know it did happen? How do we know that Carl Ankeny choked Shannon Carter on the morning of October 5th, early in the morning, causing her to jump out of the car, be distraught, scared, feel like she needs to hid (sic) and make a cry for help to Shane Nisbet; how do we know that?
>
> We know that first because, that he choked her, we know that first because she said so. That was the first thing she said when she came out and she called Shane Nisbet for help. She said, 'he tried to kill me and he choked me out'. **Those were at least the two where we can listen on the 911 tapes**, and **I invite you to listen to those tapes again; you will hear that.**

(Tr. at 248, emphasis added.)

> Shannon Carter alleged that Carl Ankeny choked her, assaulted her by trying to choke her. She was so scared she jumped out of the car and she was hiding. **If you listen to, if you listen to the tape, it's the**

> **second call. You will hear Shane Nisbet say twice, he tried to choke her out.**

(Tr. at 249, emphasis added.)

The 911 tapes should not have been admitted for the jury to hear, let alone referenced by the prosecutor as substantive evidence that the crime had happened.

Finally, the State argues that in the context of the entire closing argument, the prosecutor did not state her personal belief in Ankeny's guilt, but rather her belief that the State had met its burden to prove the elements of the crime beyond a reasonable doubt. The distinction, if any, is subtle and was no doubt lost on the jury.

The State also claims that Ankney has not shown there was "no plausible justification: for counsel's conduct." (Appellee's Br. at 25.) In view of the clear guidance from this Court that prosecutor's expressed belief in the guilt of the accused has no place during a jury trial, it is Ankeny's position that there can be no plausible justification. Like in *State v. Lindberg*, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, it is not possible to "conceive of any rationale under which defense counsel would sit on his hands and fail to object to such comments." *Lindberg*, ¶ 47.

Upon review of the record, it is clear that counsel's errors in the present case resulted in prejudice, the absence of which could have reasonably resulted in a different outcome.

CONCLUSION

For the reasons as stated herein, and for those more particularly argued in Ankeny's first brief, Ankeny requests that this Court set aside his conviction for Partner Family Member Assault or remand this case for a new trial based on the ineffectiveness of trial counsel.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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